

December 8, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE ROBERT DALTON and
DONNA DALTON, also known as
Donna Gifford,

Debtor.

BAP No. NO-05-052

PATRICK J. MALLOY, III, Trustee,

Plaintiff – Appellant,

v.

BANK OF COMMERCE,

Defendant – Appellee.

Bankr. No. 04-10025-R

Adv. No. 04-1061-R

Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Northern District of Oklahoma

Before CLARK, BROWN, and McNIFF, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

The Chapter 7 trustee timely appeals a final Judgment of the United States Bankruptcy Court for the Northern District of Oklahoma in favor of the Bank of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Commerce (Bank),¹ refusing to avoid the Bank's prepetition security interest against the debtors' truck pursuant to 11 U.S.C. § 544.² The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Northern District of Oklahoma.³ For the reasons stated herein, the bankruptcy court's Judgment is AFFIRMED.

I. Background

Robert Dalton (Dalton), a resident within the territorial boundaries of the Cherokee Nation and a member of the Nation, purchased a used truck. The Bank financed this purchase pursuant to a Consumer Promissory Note and Security Agreement.

The Cherokee Nation issued a Certificate of Title identifying Dalton as the owner of the truck under the Cherokee Nation Motor Vehicle Licensing and Tax Code (Licensing and Tax Code). The Licensing and Tax Code is recognized by Oklahoma pursuant to a Tribal-State Motor Vehicle Licensing Compact (Compact). In accordance with the Licensing and Tax Code, the Bank executed and filed a lien entry form with the Cherokee Nation Tax Commission, and its lien was noted on Dalton's Certificate of Title. The Bank did not deliver a lien entry form or pay fees to the Oklahoma Tax Commission.

In December 2003, the Bank repossessed the truck. At that time, the truck was worth \$7,500. The Bank has never returned possession of the truck to Dalton.

On January 5, 2004, Dalton and his spouse (the "Debtors") filed a Chapter

¹ 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

² Unless otherwise stated, all future statutory references in the text are to Title 11 of the United States Code.

³ 28 U.S.C. § 158(b) - (c); Fed. R. Bankr. P. 8001(e).

7 petition, and listed the truck as an asset of the estate. The trustee subsequently commenced an adversary proceeding against the Bank, alleging, in relevant part, that the Bank's security interest in the truck was avoidable under § 544 because it was not perfected under Oklahoma law on the Debtors' petition date.

The parties filed a Joint Stipulation of Facts, that were later supplemented, and cross motions for summary judgment. The bankruptcy court entered an Order denying the trustee's motion for summary judgment and granting the Bank's motion for summary judgment, and a separate Judgment in favor of the Bank. Applying the Oklahoma Uniform Commercial Code (UCC), the bankruptcy court concluded that the Bank's lien was not avoidable under § 544 because the lien was perfected when the Bank's security interest attached, which occurred prior to the Debtors' petition date.

This appeal followed.

II. Discussion

The sole issue before us is whether the bankruptcy court erred in concluding that the "perfection by attachment rule" in Oklahoma UCC, Okla. Stat. Ann. tit. 12A, § 1-9-309(1), applies to the Bank's lien.

Section 1-9-309(1) states that a purchase money security interest in consumer goods is perfected upon attachment, subject to certain exceptions. The trustee maintains that the bankruptcy court erred in failing to apply one of the exceptions in this case. In particular, § 1-9-309(1) states that perfection upon attachment applies "except as otherwise provided in subsection (b) of Section 1-9-311 of this title with respect to consumer goods that are subject to a statute or treaty described in subsection (a) of Section 1-9-311 of this title[.]"⁴ Oklahoma

⁴ Okla. Stat. Ann. tit. 12A, § 1-9-309(1) (2001). This section was amended effective November 1, 2004, but the amendments are not pertinent to the discussion herein and would not apply to this appeal inasmuch as they became effective after all dates relevant to this appeal.

UCC § 1-9-311, in turn, provides:

- (a) [T]he filing of a financing statement is not necessary or effective to perfect a security interest in property *subject to*:
.....
 - (2) another statute of this state that provides for central filing of, or that requires indication on or delivery for indication on a certificate of title of, any security interest in the property as a condition or result of perfection, including, but not limited to, Section 1110 of Title 47 . . . [.]
.....
- (b) Compliance with the requirements of a statute, regulation, or treaty described in subsection (a) of this section for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in . . . Section 1-9-313 and subsections (d) and (e) of Section 1-9-316 of this title for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (a) of this section may be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral.⁵

The trustee argues that under § 1-9-311(a)(2), the Bank's security interest in the truck is subject to § 1110 of title 47 of the Oklahoma Statutes Annotated and, therefore, under § 1-9-311(b) its interest should have been perfected in accordance with § 1110, not by attachment under § 1-9-309(1). We disagree because § 1110 does not apply in this case.

Section 1110 provides:

- A.1. Except for a security interest in [a] vehicles held by a dealer for sale or lease, and [b] a vehicle being registered in this state which was previously registered in another state and which title contains the name of a secured party on the face of the other state certificate of title, a security interest in a vehicle as to which a certificate of title may be properly issued by the Oklahoma Tax Commission shall be perfected only when a lien entry form, and the existing certificate of title, if any, or application for a certificate of title and manufacturer's certificate of origin containing the name and address of the secured party and the date of the security agreement and the

⁵ Okla. Stat. Ann. tit. 12A, § 1-9-311(a)(2) & (b) (2001) (emphasis added).

required fee are delivered to the Tax Commission or to a motor license agent.⁶

This section expressly states that it applies to a security interest “in a vehicle as to which a certificate of title may be properly issued by the Oklahoma Tax Commission”⁷ The Oklahoma Tax Commission is not the proper entity to issue a certificate of title in this case because Dalton is a member of and resides within the territorial boundaries of the Cherokee Nation and, therefore, under the Cherokee Nation’s Licencing and Tax Code and the Compact, the Cherokee Nation properly issued Dalton a Certificate of Title.⁸ The truck, therefore, was not “subject to” § 1110. As a result, the bankruptcy court did not err in refusing to apply Oklahoma UCC § 1-9-311(a)(2) and (b) in this case.

The trustee suggests that the Cherokee Nation did not have authority to issue Dalton a Certificate of Title because Dalton, an admitted member of the Nation who lives within territorial boundaries, does not live on the formal Cherokee Nation reservation. The bankruptcy court summarily rejected this argument, holding that Dalton’s registration of the truck with the Cherokee Nation was appropriate under the Compact because Dalton lives within the territorial boundaries of the Nation and the truck was garaged within those

⁶ Okla. Stat. Ann. tit. 47, § 1110.A.1 (2000). After the Debtors’ petition date, Oklahoma amended § 1110 to exclude vehicles registered by Indian nations, such as the Cherokee Nation, from its scope. Under amended § 1110, perfection of interests in vehicles registered by an Indian nation is governed by applicable tribal law. The Cherokee Nation has now enacted a Commercial Code that will govern perfection under the new law.

⁷ Id.

⁸ See Compact, § 5(d) (“the parties acknowledge, stipulate and agree that the State shall have no responsibility for issuing certificates of title and registration under the CN Motor Vehicle Code.”), in Appellant’s Appendix at 58; Licencing and Tax Code, §§ 201, 203, 205 & 210, in Appellant’s Appendix at 77-86; see generally Cherokee Nation Tax Commission Motor Vehicle Rules and Regulations, in Appellant’s Appendix at 109-69.

boundaries.⁹ We see no error in this conclusion, and the trustee has not presented any serious argument to contest it.

Finally, the trustee contends that the bankruptcy court erred in applying the Oklahoma UCC or Cherokee Nation law, because only § 1110 governs the perfection of interests in motor vehicles. This argument is flawed for several reasons. First, the bankruptcy court did not apply Cherokee Nation law. Second, for the reasons already stated, § 1110 does not govern perfection of the Bank's interest in the truck. Third, the parties' security agreement expressly anticipates application of the UCC because it provides that it is to be "construed and enforced in accordance with the laws of the State of Oklahoma, except to the extent that the UCC provides for application of the law where the debtor or the collateral is located"¹⁰ Finally, it cannot be seriously disputed that the UCC governs interests in personal property, including motor vehicles. Perfection provisions in motor vehicle laws, such as § 1110, are applicable only to the extent that they are made so under UCC's choice of law provisions. In this case, the bankruptcy court did not err in determining under the UCC that the perfection provisions in Oklahoma's Motor Vehicle Code were not applicable.

III. Conclusion

The bankruptcy court's Judgment is AFFIRMED.

⁹ Order Denying Trustee's Motion for Summary Judgment and Granting Partial Summary Judgment to Bank of Commerce at 4 n.3, in Appellant's Appendix at 202.

¹⁰ Consumer Promissory Note at 2, in Appellant's Appendix at 11.